STATE OF MICHIGAN

COURT OF APPEALS

CHARLES TERRENCE FITZPATRICK, Petitioner-Appellee,	UNPUBLISHED May 19, 2011
V PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM and PUBLIC SCHOOL EMPLOYEES RETIREMENT BOARD, Respondents-Appellants.	No. 292076 Ingham Circuit Court LC No. 06-001694-AA

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Respondents appeal by leave granted the circuit court's order denying their motion for summary disposition of petitioner's addition of a class action claim on jurisdictional grounds in this administrative appeal. Respondents also appeal the circuit court's order allowing petitioner the right to take discovery regarding the class of plaintiffs. We reverse and remand.

I. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

Petitioner's wife, Angeline Fitzpatrick, was a teacher in the Detroit Public School system until 1992. At the time she left public school employment, Mrs. Fitzpatrick had accumulated approximately 16 years of service credit in Michigan Public Schools Employee Retirement System (MPSERS). Under the Public School Employees' Retirement Act, Mrs. Fitzpatrick was considered a vested deferred member, having accumulated more than ten years of service credit before ceasing public school employment while being under the age of 60.[1] Consequently, she was eligible to receive a retirement allowance commencing on the first of the month following her 60th birthday, which fell on September 16, 2003.

[1] The amount of Mrs. Fitzpatrick's years of credited service is relevant to the merits of petitioner's administrative appeal, particularly with respect to his arguments concerning the proper interpretation of MCL 38.1389, but the merits of his claim are not before us on appeal.

In February 2003, Mrs. Fitzpatrick submitted an application for retirement, requesting that her retirement allowance begin on October 1, 2003. Mrs. Fitzpatrick also submitted a beneficiary nomination form listing petitioner as her beneficiary and selecting the 100 percent survivor option, which would reduce her retirement allowance during her lifetime and provide petitioner with the same allowance for the remainder of his lifetime, should she predecease him.[2] Unfortunately, Mrs. Fitzpatrick died on March 29, 2003, before her 60th birthday.

When evaluating petitioner's entitlement to survivor benefits, the Office of Retirement Services (ORS) found no evidence that Mrs. Fitzpatrick had filed a beneficiary nomination form while she was still employed. Hence, ORS denied petitioner's claim for benefits, contending that he was not eligible based on the timing of his wife's filing of the beneficiary nomination form, after ceasing public school employment but before her 60th birthday. ORS advised petitioner that he could obtain only the amount of retirement contributions that Mrs. Fitzpatrick had made to her account.

Petitioner requested an administrative hearing on his claim for survivor benefits. That hearing was held on March 9, 2006. The hearing officer issued a proposal for decision on July 6, 2006, wherein he found that the facts were not in dispute and the merits of the claim were governed by statute. The hearing officer opined that MCL 38.1385(1)(b) allows a designated beneficiary to receive an allowance at the time the deceased member would have been eligible to begin receiving a deferred vested allowance, but only if the deferred member had selected the option before terminating reporting unit services, in accordance with MCL 38.1382(2). Because petitioner's wife had not selected the option before terminating her employment with the Detroit Public Schools, the hearing officer concluded that petitioner was not entitled to receive survivor benefits. Consequently, the hearing officer recommended that petitioner's claim for retirement benefits be denied. Respondent Michigan Public School Employees' Retirement Board adopted the hearing officer's proposed decision to deny on October 26, 2006.

Petitioner filed a petition for review of the final agency decision denying his claim for benefits in the Ingham County Circuit Court on December 29, 2006. The parties agreed to hold the matter in abeyance for 180 days because the Legislature was apparently considering proposed legislation that might favorably impact petitioner's claim. In October 2008, in the absence of any pertinent legislative action, petitioner substituted in new counsel and filed an amended petition for review, wherein he named himself individually "and on behalf of all others similarly situated" (seeking class action certification), and seeking declaratory and injunctive relief, survivor benefits plus interest, attorney fees and costs, and a class representative fee.[3]

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[2] The amount of the monthly allowance at issue is $670.13.

[3] Petitioner described the potential class as follows:

> All persons who (i) are, or in the future may be, the surviving spouse of a member of the System who had over 15 years or had attained age 60 and acquired 10 years

Respondents moved to strike the amended petition on October 21, 2008. In a December 30, 2008 order, the circuit court denied the motion and allowed petitioner to conduct discovery regarding the class. Respondents then moved for partial summary disposition pursuant to MCR 2.116(C)(4), (8), and (10), seeking to dismiss petitioner's class action claim on jurisdictional grounds. Meanwhile, petitioner filed more discovery requests related to the class action, and respondents moved for a protective order. In response to respondents' motion, petitioner moved to compel discovery. The circuit court heard argument on the motions on April 17, 2009, at which time respondents requested that the court decide the merits of petitioner's administrative appeal, which might render the class action and associated discovery moot. The court denied the amended motion for summary disposition in a May 6, 2009 order. In a May 11, 2009 order, the court granted in part and denied in part petitioner's motion to compel discovery and respondents' motion for a protective order.

Respondents filed an application for leave to appeal the circuit court's May 6, 2009 and May 11, 2009 orders. This Court granted respondents' application by order entered August 12, 2009.

II. STANDARD OF REVIEW

We review a circuit court's decision to deny a motion for summary disposition de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). Questions of law, such as the proper interpretation of a statute or court rule or whether a court has subject matter jurisdiction to entertain an action, are also subject to de novo review. *Oakland Co Bd of Co Rd Comm'rs v Mich Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998); *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998); *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007); *Trostel, Ltd v Treasury Dep't*, 269 Mich App 433, 440; 713 NW2d 279 (2006). We review a trial court's decision regarding a motion to compel discovery for an abuse of discretion, *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005), which is the same standard we use to review a trial court's decision whether to grant a protective order, *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 35; 654 NW2d 610 (2002).

III. ANALYSIS

A. JUDICIAL REVIEW OF AGENCY DECISIONS

The Michigan Constitution provides for judicial review of administrative decisions, providing in relevant part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review

> of service and died before the member's effective retirement date (or the estate of such surviving spouse), (ii) pursuant to §85(1)(b), §89(1) or §89(3) of the Public School Employees Retirement Act, were, or in the future may be, entitled to the §85(1)(b) reduced pension, and (iii) were, or in the future may be, denied the reduced pension payable under §85(1)(b).

shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. [Const 1963, art 6 § 28.]

"In general, judicial review of an administrative decision is available under the following statutory schemes: (1) the review process prescribed in the statute applicable to the particular agency, (2) an appeal to circuit court pursuant to the Revised Judicature Act (RJA), MCL 600.631, and Michigan Court Rules 7.104(A), 7.101, and 7.103, or (3) the review provided in the Administrative Procedures Act (APA), MCL 24.201 *et seq.*" *Preserve The Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 519; 684 NW2d 847 (2004); *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 145; 577 NW2d 200 (1998). The Public School Employees' Retirement Act does not prescribe any particular appellate review process. Hence, because petitioner's appeal is from an agency decision issued following an evidentiary hearing, the APA provides the applicable method of judicial review of the decision denying petitioner's claim for benefits.[4]

In an action for judicial review of an administrative decision under the APA, the sole question presented to the circuit court is whether the administrative agency's decision was supported by the law and the facts. *Dignan v School Employees Retirement Bd*, 253 Mich App 571, 578; 659 NW2d 629 (2002). The circuit court is required to review the administrative decision to determine if it was authorized by law and whether it was supported by competent, material and substantial evidence on the whole record before the administrative agency. Const 1963, art 6, § 28; *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 202-203; 550 NW2d 867 (1996). This Court's review of a lower court's decision on review of an administrative decision is likewise limited to determining "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996); MCL 24.306(1). An agency decision that is in violation of a statute or the constitution, is in excess of the statutory authority or jurisdiction of the agency, is made upon unlawful procedures resulting in material prejudice, is arbitrary and capricious, or is

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[4] MCL 600.631 provides:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules *from which an appeal or other judicial review has not otherwise been provided for by law*, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court. [Emphasis added.]

Because judicial review in the instant case is provided for by the APA, the RJA is not implicated by the instant action.

affected by other substantial and material error of law is a decision that is not authorized by law. MCL 24.306(1); *Northwestern Nat'l Casualty Co v Comm'r of Ins*, 231 Mich App 483, 488; 586 NW2d 563 (1998). "'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Dowerek v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998). While respectful consideration is afforded to an agency's interpretation of a statute, statutory construction is the domain of the judiciary. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 97-100; 754 NW2d 259 (2008).

MCL 24.301, provides, in pertinent part, that "[w]hen a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law." A "contested case" is "a proceeding . . . in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203. For purposes of this case, a "party" is "a person or agency named, admitted or properly seeking and entitled of right to be admitted, as a party in a contested case," and a "person" is "an individual . . . engaged in a contested case." MCL 24.205(6), (7). "The typical contested case proceeding involves an individual named party and a disputed set of facts—e.g., a license denial, a denial of benefits or a statutory violation—from which results an agency order that adjudicates the specific factual dispute and operates retroactively to bind the agency and the named party." *In re Public Service Comm Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 267; 652 NW2d 1 (2002).

There is no dispute that petitioner is a person who, having exhausted his administrative remedies, is aggrieved by a final decision in a contested case.[5] Accordingly, petitioner sought judicial review of that decision pursuant to the APA. The process of judicial review of agency decisions set forth in the APA, "by its very nature, does not contemplate a new original action." *Dearborn Hts School Dist No 7 v Wayne County MEA/NEA*, 233 Mich App 120, 129; 592 NW2d 408 (1998). Rather, the APA affords judicial review, constrained by the provisions of the act

[5] As petitioner acknowledges, state agencies do not possess the authority to hear class action claims in an administrative proceeding, absent an explicit statutory grant of powers or administrative rules permitting it to do so. *Stein v Director, Bureau of Workmen's Compensation*, 77 Mich App 169, 176; 258 NW2d 179 (1977). Neither the applicable statutes nor the administrative rules provide for the hearing of class action claims as part of the administrative proceedings resolving petitioner's claim for survivor benefits under the Public School Employees' Retirement Act. Thus, there is no dispute that petitioner was not permitted to seek administrative determination of his claim for such benefits as a representative of a class of similarly situated plaintiffs.

and the applicable court rules, to a person who, having exhausted his or her administrative remedies, is aggrieved by a final agency decision.[6] MCL 24.301. MCL 24.302 provides:

> Judicial review of a final decision or order in a contested case shall be by any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections [MCL 24.303] to [MCL 24.305].

Because there is no special statutory review proceeding specified by statute in this instance, judicial review of the decision at issue here must be undertaken in accordance with MCL 24.303 to MCL 24.305. Those sections specify the manner, timing and location for the filing of the petition for review and the required content of the petition for review, and they confine review, generally, to the record made at the hearing before the administrative agency.[7] MCL 24.306 restricts the scope of the circuit court's review and authority on review of an agency decision:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an

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[6] The requirement that a party exhaust his or her administrative remedies is premised on the doctrine of the separation of powers. *Michigan Supervisors Union OPEIU Local 512 v Dep't of Civil Service*, 209 Mich App 573, 576-577; 531 NW2d 790 (1995). It enables the parties and the agency to develop the facts and produce a complete record for review, to allow the agency to apply its expertise and correct its own errors, and to promote judicial economy by preventing unnecessary resort to the courts. *Bonneville v Michigan Corrections Organization, Service Employees Int'l Union*, 190 Mich App 473, 476; 476 NW2d 411 (1991); *Compton Sand & Gravel Co v Dryden Twp*, 125 Mich App 383, 397; 336 NW2d 810 (1983), citing 2 Am Jur 2d, Administrative Law, § 595, p. 428. There is, however, a judicially created exception to the exhaustion requirement for cases where an appeal to the administrative agency would be futile. *Christensen v Michigan State Youth Soccer Ass'n, Inc*, 218 Mich App 37, 40; 553 NW2d 638 (1996), see also, *Trojan v Taylor Twp*, 352 Mich 636, 638-639; 91 NW2d 9 (1958).

[7] In order to enlarge the record beyond that presented to the agency at the contested case hearing, a party must obtain the court's leave by showing either that an inadequate record was made before the agency or that the additional evidence is material, and that there were good reasons for failing to present the additional evidence before the agency. MCL 24.305; *Northwestern Nat'l Cas Co*, 231 Mich App at 496. In the event additional evidence is required, the court "shall order the taking of additional evidence before the agency on such conditions as the court deems proper . . . ," after which the agency "may modify its findings, decisions or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record." MCL 24.305. Thus, in all cases, the evidence must be made a part of the record before the administrative agency before it may be considered by a court reviewing the agency's decision.

agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

MCR 7.105 specifically "governs an appeal to the circuit court from an agency decision in a contested case, except when a statute requires a different procedure." MCR 7.105(B)(1). It sets forth the form and content of the petition for review as follows:

(C) Form; Content; Attachment of Decision. Judicial review of an agency decision in a contested case is initiated by filing, within the time required by the applicable statute, a document entitled "Petition for Review," conforming to the following form, content, and attachment requirements.

(1) *Form.*

(a) A petition for review is captioned in the circuit court, and shall otherwise conform to the requirements of MCR 2.113.

(b) The person aggrieved by the agency decision is the "petitioner" and is listed first in the caption. A person who seeks to sustain the decision of the agency is the "respondent." If there is no respondent, the caption may read "In re [*name of petitioner or other identification of subject of the case*]," followed by the name of the petitioner. Except when otherwise provided by law, the agency or another party to the contested case may become a respondent by promptly filing an appearance.

(c) The petition for review must state:

"[*Name of aggrieved party*] petitions for review of the decision entered [*date*] by [*name of agency*]."

(d) The petitioner or petitioner's attorney, must date and sign the petition for review and place his or her business address and telephone number under the signature.

(2) *Content.* The petition for review must contain a concise statement of:

(a) the nature of the proceedings as to which review is sought, including the authority under which the proceedings were conducted, and any statutory authority for review;

(b) the facts on which venue is based;

(c) the grounds on which relief is sought, stated in as many separate paragraphs as there are separate grounds alleged;

(d) the relief sought.

(3) *Attachment.* The petitioner shall attach to the petition for review, as an exhibit, a copy of the agency decision of which review is sought, or explain why it is not attached. [MCR 7.105(C).]

Of note, the rule contemplates the filing of a petition by a named, individual, aggrieved party, acting in his or her own stead. MCR 7.105(C)(1)(c). The rule addresses service, the filing of an answer, the manner in which a petitioner may seek interlocutory review of non-final agency orders, and the procedure and grounds for granting a stay of enforcement of the agency decision or order being appealed. MCR 7.105(D)-(G). It further provides for the entry of stipulations by the parties, for an application to present additional evidence, and for motions to dismiss, or affirm or for peremptory reversal. MCR 7.105(H)-(J). It sets forth the timing for the filing of briefs and for oral argument, if requested. MCR 7.105(K). It instructs the circuit court as to its authority and responsibility in issuing its decision on the merits:

(M) Order, Findings, Relief and Final Process.

On completing review the court shall enter a written order. The court may affirm, reverse, remand, or modify the decision of the agency and may grant the petitioner or the respondent further relief as appropriate based on the record, findings, and conclusions. When the court finds that the decision or order of an agency is not supported by competent, material, and substantial evidence on the whole record, the court shall separately state which finding or findings of the agency are so affected. When the court finds that a decision or order of an agency violates the constitution or a statute, is affected by a material error of law, or is affected by unlawful procedure resulting in material prejudice to a party, the court shall state its findings of fact and conclusions of law and the reasons for its conclusions, and identify those conclusions of law of the agency, if any, that are being reversed. [MCR 7.105(M).]

MCR 7.105 also provides that upon finding that the appeal or any proceedings in the appeal were vexatious, the circuit court may dismiss the petition for review, assess punitive damages in an amount not exceeding "the actual or reasonable costs or expenses of the opposing parties, including the reasonable attorney fees," or take other disciplinary action.[8] MCR 7.105(N).

B. CLASS ACTION PROCEEDINGS AND THE APA

Respondents argue on appeal that the circuit court erred by denying summary disposition of petitioner's class action claim. Respondents contend that there is no authority permitting the addition of a class action claim to the petition for review of respondents' decision denying petitioner's claim for survivor benefits. Respondents observe that the APA does not provide for class action claims and further assert that it does not authorize the type of relief requested by the class action claim, which seeks money damages by way of interest on unpaid retirement benefits, attorney fees and costs and a class representative fee. Respondents argue that, while the circuit court has subject matter jurisdiction over petitioner's administrative appeal, it lacks subject matter jurisdiction over the class action claim, which can only be brought in the Court of Claims. Further, respondents contend that, even if the matter could be treated as a class action, the circuit court erred by failing to decide the merits of the administrative appeal before ordering discovery regarding the class, which respondents claim would be extremely expensive and time consuming.

Petitioner responds that the circuit court has jurisdiction over the amended petition for review and, further, that because MCL 24.302 provides that judicial review of a final administrative decision shall be in accordance with the "general court rules," and MCR 3.501 allows for class actions, such a claim is permitted here. Petitioner cites *Bays v Dept of State Police (Bays I)*, 89 Mich App 356; 280 NW2d 526 (1979) in support for the latter assertion. Petitioner also contends that the circuit court properly declined to rule on the merits of petitioner's claim before class discovery was completed because a decision on the merits issued before discovery of the class members would not be binding on those later-identified class members. Finally, petitioner claims that the discovery ordered by the circuit court was limited to evaluation of the potential size of the class, and thus, contrary to respondents' suggestion, it would not impermissibly expand the administrative record regarding the merits of petitioner's claim.

We agree with respondents that, considering the limited nature of such proceedings before the circuit court, there is no authority allowing the addition of a class action claim to an action for judicial review of an aggrieved person's administrative appeal under the APA. Even were we to conclude that exhaustion of administrative remedies would be excused for the putative class members, (a likely finding considering that the question is a purely legal one of statutory interpretation, see, *Michigan Waste Systems, Inc* v *Dep't of Natural Resources*, 157 Mich App 746, 759-760; 403 NW2d 608 (1987) (remand for exhaustion of administrative

[8] Thus, while MCR 7.105(N) contemplates the award of attorney fees and costs, it does so only in the context of vexatiousness in the appeal or appeal proceedings; absent such a finding, there is no authority permitting the circuit court to award attorney fees and costs in such actions.

remedies is not required "for the mere purpose of obtaining the opinion of a hearing officer as to legal matters which will ultimately be decided by this Court in any case.")), there is no authority for the circuit court to order discovery to identify those class members, and, further, absent a finding of vexatiousness, the circuit court plainly lacks the authority to award interest, attorney fees and costs, or a class representative fee in the context of an APA proceeding. Rather, if petitioner prevails on the legal issue presented by his petition for review, he (or another similarly situation person) may then properly file a class action complaint for superintending control in the circuit court directing respondents to pay retirement benefits consistent with the legal ruling resolving the substantive issue in petitioner's favor.[9]

By its plain language, the APA provides for judicial review of an adverse agency decision issued to a named party. MCL 24.301. Petitioner's individual claim was the only one heard in the administrative proceedings; no other "person" was a named "party" to the "contested case" resulting in the decision from which petitioner seeks judicial review. Moreover, MCL 24.306 restricts the circuit court's authority on review of administrative proceedings, to affirming, reversing or modifying the decision, or remanding it for further proceedings, on one of the enumerated bases. Thus, if the circuit court determines that respondents' interpretation and application of the pertinent provisions of the Public School Employees Retirement Act is erroneous, the proper course of action would be to reverse respondents' decision denying petitioner's claim for benefits. The circuit court is not empowered by the APA to do anything more. Conversely, the conversion of petitioner's case into a class action would require de novo action on the part of the circuit court, outside the scope of review provided for by the APA, including the permitting of extensive discovery not contemplated by the act.

Likewise, nowhere does MCR 7.105 provide for, or contemplate, the addition of unnamed class members to the petition for judicial review of an administrative decision. There is nothing in the rule to permit discovery of putative class members, nor, absent a finding of vexatiousness in the proceedings, to permit the award of attorney fees and costs. Simply stated,

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[9] As discussed further *infra*, petitioner argues in the alternative that if we find that the class action claim cannot be added to his petition for review, this Court should order that his class action claims be re-filed in the circuit court by way of a complaint for superintending control, and further, that class discovery be completed in that action before any briefing or ruling on the merits of petitioner's challenge to the administrative determination denying his claim for benefits. However, a plaintiff may obtain an order of superintending control only by showing that the defendant has violated a clear legal duty to take a particular ministerial action *and* that the plaintiff is without other adequate legal or equitable remedy that might achieve the same result. *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 134; 503 NW2d 885 (1993); *The Cadle Co v Kentwood*, 285 Mich App 240, 246; 776 NW2d 145 (2009). Consequently, petitioner must first pursue the instant action for judicial review of the administrative decision denying his claim for benefits before he may file a class action claim for seeking an order of superintending control. *Id*.

neither the APA nor MCR 7.105 envisions the addition of a class action to a petition seeking judicial review of an agency decision.

The authorities relied on by petitioner to assert otherwise are not persuasive. In *Bays I*, 89 Mich App 356 (1979), a group of Michigan State Police officers sought compensation for scheduled off-duty standby time in the Court of Claims. This Court held that the plaintiff officers failed to exhaust their administrative remedies before the Civil Service Commission and, finding that exhaustion of those remedies was not excused considering the facts and circumstances presented, it remanded the matter to the Commission. This Court noted that "[t]he Court of Claims reserved judgment on whether the named plaintiffs could proceed as representatives of a class composed of all officers of the Michigan State Police similarly situated," and it declined to express an opinion on that issue, noting instead only that

> [its] order of remand to the Civil Service Commission for exhaustion of administrative remedies will be adequately followed if one of the named plaintiffs exhausts those remedies. The reviewing court, if judicial review is sought, can then reach the merits of the class action issue if it is again raised in that forum. [*Id*. at 363, n 1]

The Court further concluded that the appropriate judicial review of any subsequent appeal from the Commission was in the circuit court and not in the Court of Claims. *Id.* at 362-363. On remand, the Civil Service Commission denied plaintiffs' claims for standby compensation, and the circuit court affirmed. This Court's decision on appeal following remand notes that there were 15 named plaintiffs; it makes no mention of class certification. *Bays v Dept of State Police (Bays II)*, 119 Mich App 719; 326 NW2d 620 (1982). Thus, at no time during the course of either *Bays I* or *Bays II* did this Court, or any court, address the propriety of bringing a petition seeking review of an administrative decision as a class action. Instead, the holding in *Bays I*, is, at least implicitly, premised on the notion that, once the Civil Service Commission rendered an adverse decision on the claim of one of the named plaintiffs, the remaining named plaintiffs would be excused from the exhaustion requirement on the basis that their appeal to the administrative agency would be futile. See also, *Michigan Waste Systems*, 157 Mich App at 759-760 (remand for exhaustion of administrative remedies is not required "for the mere purpose of obtaining the opinion of a hearing officer as to legal matters which will ultimately be decided by this Court in any case.").

Further, in *Bays*, unlike in the instant matter, the identity of the group of plaintiffs seeking review of the agency's interpretation of applicable rules was known – that is, they were each *named* plaintiffs – and thus the issue as to their joinder in the administrative review proceedings was merely one as to whether any or all of them were required to exhaust their administrative remedies before judicial review could take place. Neither *Bays I* nor *Bays II* provide any authority permitting the circuit court to order discovery to identify unknown class

members during the course of an action seeking review of an administrative decision, as constrained by the APA.[10]

Petitioner argues that, by referencing the "general court rules," MCL 24.302 permits him to include a class action claim, under MCR 3.501, in his petition for review. We disagree that petitioner may avail himself of MCR 3.501 in these proceedings. In *Meadows v Marquette Prison Warden*, 117 Mich App 794, 800-801; 324 NW2d 507 (1982), this Court acknowledged that "[t]he Administrative Procedures Act provides that the court rules govern procedure in a judicial review of an agency decision where those rules are applicable." The Court indicated, however, that rather than looking to *all* court rules that might apply generally to civil proceedings, the circuit court is to look to the *specific* court rules applicable to appeals from an agency decision. *Id.* at 801. Thus, where the specifically applicable court rule provides guidance, the court is to follow it; in the absence of a specifically applicable court rule, the courts are governed by MCL 24.303-24.305.[11] See also, *Nestell v Bridgeport-Spaulding Bd of Ed*, 138

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[10] Petitioner also cites the decision of this Court in *Gonek v Workers Disability Compensation Bureau*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2002 (Docket No. 219610), in which a panel of this Court affirmed the circuit court's decisions granting class certification and issuing a writ of mandamus requiring payment of benefits previously determined to be owed to the plaintiff class. We first note that, as an unpublished decision, *Gonek* lacks precedential authority, MCR 7.215(C)(1). We also note that it was vacated by this Court upon reconsideration, *Gonek v Workers Disability Compensation Bureau*, unpublished order of the Court of Appeals, entered March 11, 2002 (Docket No. 219610), and that the appeal was ultimately dismissed by stipulation of the parties, *Gonek v Workers Disability Compensation Bureau*, unpublished order of the Court of Appeals, entered June 25, 2002 (Docket No. 219610). Further, to the extent that *Gonek* would have been instructive, it counsels in favor of the result reached in this case, not in favor of the position espoused by petitioner. In *Gonek*, the substantive legal issues as to the plaintiffs' eligibility for the benefits sought having been finally resolved by our Supreme Court, the plaintiffs sought a writ of mandamus, by way of a class action, seeking payment of those benefits. This Court determined in that context that the circuit court neither erred by certifying the class, nor abused its discretion by granting the writ of mandamus ordering the benefits paid. *Gonek* did not involve, or in any way address, the bringing of a class action claim attendant to an action for review of the administrative decision denying the benefits sought by the plaintiffs. Nor, even had it not been vacated, would we find it to counsel in favor of a finding that a class action ought to be permitted attendant to the petition for judicial review of respondents' decision denying petitioner survivor benefits. *Gonek* simply concluded that, the clear legal duty to pay benefits having been established, the plaintiffs could seek payment of those benefits by way of a class action for a writ of mandamus.

[11] In *Meadows*, petitioner sought review of an adverse decision by the Department of Corrections. This Court determined that:

> [w]hile GCR 1963, 706 covers appeals from certain agencies, the Department of Corrections is not included. Moreover, an examination of the balance of Chapter 70 of General Court Rules discloses no procedures for appeals from the agency

Mich App 401, 405; 360 NW2d 200 (1984) (circuit court abused its discretion by dismissing the petition for review for want of prosecution under GCR 1963, 501.3, as that court rule was inapplicable in an administrative appeal). At the time *Meadows* was decided, the court rule governing judicial review of agency decisions was GCR 1963, 706; now it is MCR 7.105.[12] As noted previously, MCR 7.105 specifically "governs an appeal to the circuit court from an agency decision in a contested case, except when a statue requires a different procedure." MCR 7.105(B)(1). There is no statute requiring a different procedure in this case. Further, for the purposes of MCR 7.105, an "agency" is

> [a] state department, bureau, division, section, board, commission, trustee, authority or officer created by the constitution, statute, or agency action, from whose decision in a contested case an appeal to the circuit court is authorized by law. It does not include an agency in the legislative or judicial branches of government, the Governor, the Bureau of Workmen's Compensation, the Worker's Compensation Appeal Board, a Michigan employment security hearing referee, or the Michigan Employment Security Board of Review. [MCR 7.105(A)(1).]

Respondents meet this definition. Thus, the circuit court is bound to follow MCR 7.105 in this case. Nothing in MCR 7.105 or the APA directs, or permits, the circuit court to apply MCR 3.501 in cases involving administrative appeals. Moreover, MCR 1.103 specifically provides that:

> The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan. *Rules stated to be applicable only in a specific court or only to a specific type of proceeding apply only to that court or to that type of proceeding* ***and control over general rules***. [Emphasis added.]

And, again, we note that the process of judicial review of agency decisions set forth in the APA, "by its very nature, does not contemplate a new original action." *Dearborn Hts School Dist No 7*, 233 Mich App at 129. Thus, there is no basis to find that MCR 3.501 applies to permit class action proceedings in administrative appeals, governed by MCR 7.105 and the APA.[13]

> herein involved. Hence the court rules do not control and we are governed by §§ 103-105 of the Administrative Procedures Act.

[12] At the time the APA was enacted, practice and procedure in the courts was governed by the General Court Rules of 1963. Hence, contrary to petitioner's characterization of the language of MCL 24.302, the statute's reference to "general court rules" is not to that subset of our state's court rules that are generally applicable to civil proceedings. Rather it is to those court rules that are specifically applicable to petitions for review of administrative decisions. *Meadows*, 117 Mich App at 801; MCL 24.302; MCR 7.105

[13] In support of his assertion that MCR 3.501 permits the filing of an attendant class action claim here, petitioner relies, to some extent, on the availability of class action claims in certain federal cases. However, we find that reliance misplaced. While Michigan courts may find federal

decisions to be relevant, or even to be highly persuasive, where the federal and Michigan rules are similar in language and parallel in purpose, see e.g., *People v Malone*, 445 Mich 369, 386; 518 NW2d 418 (1994), there is a significant difference in the language of MCR 1.103 and Federal Rule of Civil Procedure 1 material to the issue at hand. Federal Rule of Civil Procedure 1 provides that those rules "govern the procedure in *all* civil actions and proceedings in the United States district courts, except as stated in Rule 81." (Emphasis added.) Rule 81 defines the applicability of the rules in "prize proceedings in admiralty," bankruptcy proceedings, proceedings for admission to citizenship, proceedings for habeas corpus and quo warranto, and proceedings involving a subpoena, as well as in actions removed from state courts; it does not address challenges to administrative decisions or actions brought under the federal Employment Retirement Income Security Act (ERISA). Moreover, there is no Federal Rule of Civil Procedure specifically directed to actions challenging agency decisions, such as we have with MCR 7.105. Accordingly, relying on the broad applicability of the Federal Rules of Civil Procedure, including Rule 23 governing class actions, as provided for by Federal Rule of Civil Procedure 1, the federal courts have upheld the availability of class action proceedings in federal actions challenging decisions issued under a range of federal statutes and programs, including ERISA, the Social Security Act, and the Individuals with Disabilities Education Act. See, e.g., *DL v District of Columbia*, 450 F Supp 2d 11 (DC 2006); *Stewart v Nynex Corp*, 78 F Supp 2d 172 (SDNY 1999); *Andre v Chater*, 910 F Supp 1352 (SD IN 1995). As the United States Supreme Court explained in *Califano v Yamasaki*, 442 US 682, 699-700; 99 S Ct 2545; 61 L Ed 2d 176 (1979):

> Section 205(g) [of the Social Security Act, 42 USC § 405(g)] contains no express limitation of class relief. It prescribes that judicial review shall be by the usual type of "civil action" brought routinely in district court in connection with the array of civil litigation. Federal Rule Civ. Proc. 1, in turn, provides that the Rules "govern the procedure in the United States district courts in *all* suits of a civil nature." (Emphasis added.) Those Rules provide for class actions of the type certified in this case. Fed. Rule Civ. Proc. 23(b)(2). In the absence of a direct expression by Congress of its intent to depart from the usual course of trying "all suits of a civil nature" under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court, including those seeking to overturn determinations of the departments of the Executive Branch of the Government in cases where judicial review of such determinations is authorized.

However, as noted above, the Michigan Court Rules do not provide for such broad applicability. Additionally, MCR 1.103 specifies that court rules applicable to special proceedings, such as MCR 7.105, control over general court rules. Further, in Michigan, petitions seeking review of administrative agency decisions are not prosecuted by the "usual type of 'civil' action' brought routinely in [circuit] courts." *Califano*, 442 US at 698. Thus, while we might find the reasoning of the United States Supreme Court in *Califano* to be persuasive were the Michigan Court Rules similar to the Federal Rules of Civil Procedure in applicable regard, absent that similarity, we do not find the federal decisions permitting the inclusion of class action claims in civil actions seeking review of federal agency decisions to be relevant or persuasive in deciding the issues presented by the instant case. Furthermore, the class action lawsuits cited by petitioner involving

By adding a class action to his petition for review, petitioner also expanded upon the relief sought beyond that awardable by the circuit court in an action seeking review of an administrative decision. As noted, the APA affords the circuit court with the authority to affirm, reverse or modify respondents' decision that petitioner is not entitled to survivor benefits under the Public School Employees' Retirement Act. MCL 24.306(2). The circuit court does not, however, have the authority to award petitioner interest on unpaid benefits, attorney fees and costs (absent a finding of vexatiousness in the proceedings), or a class representative fee. See, e.g., *Tompkins v Dempsey*, 97 Mich App 218, 224-225; 293 NW2d 771 (1980) (while the circuit court had authority to order that the petitioner be reimbursed for welfare assistance improperly denied by agency's decision, it lacked "the jurisdiction to award consequential damages in an appeal from an administrative decision"; rather, any claim for consequential damages must be brought as an original action in the Court of Claims); see also *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 774-775 ; 664 NW2d 185 (2003) (the circuit court lacks jurisdiction over claims within the exclusive jurisdiction of the Court of Claims); *Greenfield Construction Co v Dep't of State Highways*, 402 Mich 172, 196-198; 261 NW2d 718 (1978) (claims over which Court of Claims has exclusive jurisdiction may not be prosecuted in an administrative appeal proceeding in the circuit court); MCR 7.105(N) (attorney fees and costs may be awarded upon a finding that the appeal or any proceedings in the appeal were vexatious).[14]

That said, however, should petitioner prevail on his claim that respondents' interpretation and application of the Public School Employees' Retirement Act, and particularly of MCL 38.1389, is erroneous, that decision will constitute binding precedent on respondents. See, *Koontz v Ameritech Services, Inc*, 466 Mich 304, 324; 645 NW2d 34 (2002), quoting *Consumers Power Co v Pub Service Comm*, 460 Mich 148, 157 n 8; 596 NW2d 126 (1999); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 591-592; 513 NW2d 773 (1994); *S Abraham & Sons, Inc v Dep't of Treasury*, 260 Mich App 1, 20; 677 NW2d 31 (2003) ("it is within the province of the courts, not administrative agencies, to determine and apply the law," and an agency's interpretation of a statue cannot override the statute's plain meaning). Further, judicial decisions interpreting a statute are ordinarily afforded full retroactivity, *Lincoln v General Motors Corp*, 461 Mich 483; 607 NW2d 73 (2000), and in such cases, retroactive application is not limited to those who raised the issue in a timely manner, *Riley v Northland Geriatric Center*, 431 Mich 632, 649, n 11; 433 NW2d 787 (1988). Therefore, if petitioner prevails on his substantive claim, respondents will be bound to pay survivor benefits to all persons to whom such benefits were

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pension rights under ERISA were not actions seeking review of administrative decisions, but rather were direct actions, governed by the Federal Rules of Civil Procedure, against employers or retirement plan administrators alleged to have violated ERISA. Consequently, that class actions were permitted in these cases is likewise of no guidance to us here.

[14] In the absence of the authority to order the additional relief sought, there is no benefit to be gained by petitioner in obtaining judicial review of the decision denying his request for survivor benefits as a representative of a plaintiff class. Nor do we find any efficiency to be obtained by the judicial system were the action to proceed in that manner.

previously erroneously denied.[15] And, should respondents fail to comply with this duty, petitioner (or another aggrieved person) may then file an action in the circuit court, which may be brought as a class action with its attendant discovery and the availability of fees and costs, seeking an order of superintending control compelling respondents to comply with their legal duty in this regard.[16] MCR 3.301; 3.305, 3.501; *Jones v Dep't of Corrections*, 468 Mich 646, 658; 664 NW2d 717 (2003); *Lee v Macomb Co Bd of Comm'rs*, 235 Mich App 323, 331; 597 NW2d 545 (1999), rev'd on other grounds 464 Mich 726; 629 NW2d 900 (2001).

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[15] Indeed, respondents have repeatedly acknowledged that, if the substantive issue is resolved in petitioner's favor, it would apply that decision to all deferred members not yet eligible for a retirement allowance and to all current employees. Respondents have also acknowledged that a ruling in petitioner's favor will also apply to any individual whose spouse died without filing a beneficiary nomination form and who thus had their claim for survivor retirement benefits denied; respondents concede that "these individuals could obtain up to six years of retroactive retirement benefits plus benefits for the rest of their life." Finally, respondents represent to this Court that, if petitioner prevails on his challenge to respondents' decision denying his claim for survivor benefits, petitioner and "the other potential class members, would be granted any and all relief that can be provided by the [r]espondents."

[16] Actions seeking superintending control seek to "enforce[] the superintending control power of a court over lower courts or tribunals." MCR 3.302(A). Tribunals include administrative agencies acting in a judicial or quasi-judicial capacity. *Fort v City of Detroit*, 146 Mich App 499, 503; 381 NW2d 754 (1985); *Parshay v Warden of Marquette Prison*, 30 Mich App 556, 559; 186 NW2d 859 (1971). Thus, a complaint for superintending control is the proper mechanism for seeking an order directing respondents to pay owed benefits. See, *Public School Employees' Retirement Bd v Wexford Circuit Judge*, 39 Mich App 568; 197 NW2d 854 (1972). Unlike the filing of an action seeking review of an administrative decision, an action seeking superintending control is not an appeal, but rather "[i]t is an original civil action designed to require the defendant to perform a clear legal duty." *People v Yeotis (Flint Municipal Judge)*, 383 Mich 429, 432; 175 NW2d 750 (1970); *Beer v City of Fraser Civil Service Comm*, 127 Mich App 239, 242; 338 NW2d 197 (1983). Accordingly, MCR 3.301(3) specifically provides that "[t]he general rules of procedure apply [to actions for superintending control] except as otherwise provided in this subchapter." Nothing in that subchapter excepts from application the court rules governing discovery or class actions. See, e.g., *Lee v Macomb Co Bd of Comm'rs*, 235 Mich App 323, 331; 597 NW2d 545 (1999), rev'd on other grounds 464 Mich 726; 629 NW2d 900 (2001) (mandamus was an appropriate remedy in a class action to compel compliance with veteran's relief fund act); *In re Gosnell*, 234 Mich App 326, 332-333; 594 NW2d 90 (1999) (circuit court taking superintending control ordered respondent to produce records relating to all peace bonds issued in the 12th District Court); *In re Rupert*, 205 Mich App 474, 477-478; 517 NW2d 794 (1994) (circuit court is permitted to undertake proceedings to further develop the record, but is not required to do so); *Cahill v Fifteenth Dist Judge*, 70 Mich App 1, 2, 4 n 4; 245 NW2d 381 (1976) (plaintiff properly brought a class action seeking superintending control regarding application of bond schedule in cases involving traffic cases).

As a final note, we observe that respondents correctly state that the Court of Claims has jurisdiction over claims that seek money damages from a state entity. MCL 600.6419. However, the Court of Claims has no jurisdiction to review an administrative action. *Bays I*, 89 Mich App at 362. Thus, petitioner properly brought his petition for review of respondents' decision denying his claim for survivor benefits in the circuit court, although, as discussed, the circuit court is without authority to entertain that review as a class action.

Because we conclude that the circuit court was without the authority to add a class of plaintiffs to the petition for review, we also conclude that the circuit court abused its discretion by permitting discovery on the issue of numerosity of the potential plaintiff class in the instant action. Petitioner argues that, even upon a finding that the class action claim was not permitted to be added to petitioner's petition for review, we should affirm the circuit court's discovery order, considering that the circuit court will have jurisdiction over any complaint for superintending control. Petitioner requests that this Court order that his class action claims be re-filed in the circuit court by way of a complaint for superintending control and, further, that class discovery be completed in that action before any briefing or ruling on the merits of petitioner's challenge to the administrative determination denying his claim for benefits. We decline to do so.

A plaintiff may obtain an order of superintending control only by showing that the defendant has violated a clear legal duty to take a particular action *and* that the plaintiff is without other adequate legal or equitable remedy that might achieve the same result. *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 134; 503 NW2d 885 (1993); *The Cadle Co v Kentwood*, 285 Mich App 240, 246; 776 NW2d 145 (2009). Consequently, the exercise of superintending control is generally precluded when appeal to a court or an administrative body is available. *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 500; 550 NW2d 515 (1996); *Shepherd Montessori Center Milan v Ann Arbor Twp*, 259 Mich App 315, 347; 675 NW2d 271 (2003). Where an appeal is available, it must be utilized and any complaint for superintending control must be dismissed. *Id.*; see also, *Barham v Workers' Compensation Appeal Bd*, 184 Mich App 121, 127; 457 NW2d 349 (1990); MCR 3.302(D)(2). Thus, petitioner must first pursue the instant action for judicial review of the administrative decision denying his claim for benefits before he may file a class action claim for superintending control. *Id*. Accordingly, there is no basis for ordering that an action for superintending control proceed concurrently with the instant action, nor that resolution of the substantive issue presented by the instant action be delayed until class action discovery is completed in any such concurrent action. If petitioner prevails on the legal issue presented by his petition for review, he (or another similarly situation plaintiff) may then file a class action complaint in the circuit court seeking an order of superintending control directing respondents to pay retirement benefits consistent with the legal ruling resolving the substantive issue in petitioner's favor. The possibility of such future action, however, does not warrant affirmance of the circuit court's discovery order entered in the instant action.

Reversed and remanded for consideration of the named petitioner's petition for review.[17] We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Donald S. Owens

[17] Petitioner's individual action remains viable. See also MCR 3.501(B)(3)(e).